86 1474

NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ELLIS S. RUBIN,

Petitioner,

v.

STATE OF FLORIDA,
and
FRED CRAWFORD,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

THE PETITION FOR WRIT OF CERTIORARI AND AN APPENDIX

ELLIS S. RUBIN
Counsel of Record For
Petitioner and a
member of The Bar
of this Court
c/o Ellis Rubin Law
Offices, P.A.
and
I. MARK RUBIN
of counsel for
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48 pp

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

QUESTIONS PRESENTED FOR REVIEW
Introduction

The main issues here are: What should the lawyer do when his criminal client intends to testify falsely in State Court? And, when ethics and a Court Order collide, must a lawyer be jailed for choosing ethics?

1. After an attorney has advised the court during an attempted withdrawal that his client/defendant intends to testify falsely, may the attorney be found in direct criminal contempt for refusing a direct order of the State trial court to present his client/defendant to the jury to narrate known false testimony?

2. Does such an order by a State trial judge allow the attorney to: (a) represent his client within the bounds of the law; (b) facilitate the court's search for the truth; (c) preserve and promote the efficient opera tion of our system of justice; (d) obey ethi cal standards of not participating in a dishonest trial or jury deception or fraud on the court; (e) avoid possible future criminal prosecution for conspiracy and aiding and abetting perjury; (f) avoid a stigma of antisocial conduct if convicted of contempt; (g) avoid possible future disciplinary action by the Bar Association for participating in and presenting false evidence; (h) make a rational and reasonable choice between 35 years of

obeying his Oath, the Code of Ethics, case law, and criminal statutes OR obeying a unique and unauthorized, untested Order of the trial judge?

3. Does such refusal by the attorney after attempted withdrawal and disclosure of probable client perjury demonstrate proof beyond a reasonable doubt of guilt of: (a) reckless disregard for his professional duties; (b) conduct exceeding reasonable limits; (c) mali cious, willful, contumacious misbehavior intended to actually obstruct the court in its performance of judicial duties; (d) and hinderence of the system's rational search for the truth OR did such conduct interpose a good faith refusal to violate 35 years of adherence to the attorney's Oath, old

Codes of Ethics and the current Code of Professional Responsibility, Supreme Court of Florida case law and criminal perjury statutes?

4. If the Third District Court of Appeal of Florida and the Supreme Court of Florida were advised of the Supreme Court of the United States decision of Nix v. Whiteside, 106 S.Ct. 988 (1986), before those Florida Courts decided the appeal of Petitioner's direct criminal contempt conviction and the Petitioner's Writ of Habeas Corpus, was their absolute ignoring or overlooking of Nix (which answered all of the questions presented in the Petition at Bar favorably to the Petitioner), fundamentally fair OR did such denial of the existence of Nix by the Florida Courts

deprive Petitioner of that substantive due process required by the 14th Amendment of the United States Constitution.

5. By not adhering to the holdings and precedents set by the United States Supreme Court in Nix (supra), and in Maness v. Meyers, 95 S.Ct. 584 (1975) (permitting attorneys to take appropriate good faith steps to test questionable orders by precompliance disobedience), and in Shillitani v. United States, 86 S.Ct. 1531 (1966) (affording attorneys who do not have the ability to comply with court orders in any meaningful sense a defense to criminal contempt), have the Florida Courts deprived Petitioner of fundamental fairness and substantive due process as

found in the 14th Amendment to the Constitution of the United States?

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GROUNDS FOR SUPREME COURT JUSRISDICTION

The Orders of the Supreme Court of Florida sought to be reviewed, are: the Order declining to accept jurisdiction, thus denying the Petition for Review (Writ of Certiorari to the Third District Court of Appeals of Florida) in Case #69,048 and the Order denying the Petition for Writ of Habeas Corpus in Case #69,025 are both dated December 19, 1986.

Pursuant to Supreme Court Rule 19.4, this single Petitioner covering both cases is being filed.

The Order of the Supreme Court of Florida denying Petitioner's Motion For Rehearing on that denial of the Petition for Writ of Habeas Corpus in Case #69,025 is dated January 16, 1987.

The statutory provision conferring jurisdiction on the Supreme Court of the United States is found in 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES INVOLVED

The principal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the full text of which is printed in the Appendix hereto (A-141).

The regulations involved are: The Florida Oath Of Attorneys, The Integration Rule Of The Florida Bar, and The Florida Code Of Professional Responsibility, excerpts of which are printed in the Appendix hereto (A-97 to 140).

The Statutes involved are Sections 837.02(1), 777.011 and 777.04(3) Florida Statutes, set forth in the Appendix hereto (A-143 to 146).

STATEMENT OF THE FACTS AND THE CASE

Petitioner was convicted, adjudged guilty of direct criminal contempt, and sentenced to thirty (30) days in jail by the Circuit Court In And For Dade County, Florida in September, 1985 for willfully refusing to obey a direct order to proceed to trial by jury forthwith as defense counsel for a first degree murder Defendant (A-9).

Just prior to the trial, first degree murder defendant/client Sanborn threatens, then promises to testify falsely on his own behalf during trial; he demands that the atttorney/Petitioner aid, assist, and cover up the perjury. The attorney refuses.

The attorney attempts to dissuade the

client from such activity; the client refuses to abide by the attorney's advice; then the client agrees to the attorney's intended withdrawal in Open Court on the day of trial. The attorney files a written mandatory and permissive Motion To Withdraw and argues same to the Trial Judge at the trial call, alleging certain obligations in the attorney's Code of Professional Responsibility the Attorney's Oath and criminal statutes... while invoking attorney-client privilege not to reveal specifics.(A-22).

Assuming intended client-perjury, the Trial Judge denies the attorney's Motion To Withdraw and agrees with the Prosecutor's suggestion by ordering defense counsel to: (a) allow the

client to testify falsely by narrative only; (b) not refer to the defendant's perjurious testimony in closing argument.

The attorney, on ethical grounds, refuses to proceed, but the Trial Judge allows him to file an immediate Petition For Certiorari of the denial of the Motion To Withdraw (A-12).

The Third District Court of Appeal of Florida affirms the denial of the withdrawal in Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985) and suggests that defense attorney proceed to trial using the formula of no direct elicitation of testimony from the client and no reference to the narration in closing arguments. The Opinion notes a

pending case, Nix v. Whiteside, in the United States Supreme Court, by which it is hoped the attorney's duty to deal with intended client perjury will be clarified. (A-15). A Motion For Rehearing is denied (A-27).

The Trial Court then orders the attorney to immediately proceed to trial as suggested by the Appellate Court. The attorney respectfully declines, citing his Oath, The Code Of Professional Responsibility, and certain criminal statutes as reasons (A-35). The attorney is immediately charged by the Trial Judge with direct criminal contempt for refusal to proceed to trial and is convicted, adjudicated guilty and sentenced to thirty (30) days in jail (A-9).

Motion for New Trial is denied (A-45).

While free on his own recognizance, the attorney appeals the contempt to Florida's Third District Court of Appeal.

During the pendency of the appeal, the Petitioner is officially notified by The Florida Bar of Complaint because of the contempt finding. He is being charged with a possible violation of engaging in conduct "that is prejudicial to the adminisitration of justice" and "that adversely reflects on his fitness to practice law." Those charges are still pending (A-49).

After submission of briefs by both sides, the State of Florida provides the Appellate Court with copies of Nix v.

Whiteside, 106 Sup. Ct. (1986) (A-50). One hundred and eleven days later, the Third District Court of Appeal affirms Petitioner's contempt and sentence in Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986). Not one word of Nix (supra) appears therein (A-4); however, the Court acknowledges that its ruling in Sanborn is "the law of the case" in Rubin. Petitioner is jailed upon rehearing being denied.

The attorney petitions the Supreme Court of Florida for its Writ of Habeas Corpus and is temporarily released pending disposition (A-52). Petitioner also appeals to the Florida Supreme Court from the Third District Court of Appeal's affirmance by way of Petition for Review (A-58). The State files a

Response in the habeas proceeding (A-59), and Petitioner files a Second Amended Reply that raised and argued every issue at bar here (A-66). Both the Habeas Corpus and Petition for Review from the Third District Court of Appeal are denied on December 19, 1986 in Rubin v. Crawford, Case #69,025 (A-2) and Rubin v. State, Case #69,048 (A-1). Motion For Rehearing is filed in Habeas Corpus Case #69,025 (A-93) and is denied on January 16, 1987 (A-3). Rehearing was not allowed on the Appeal Case 69,0[illegible].

Petitioner was reincarcerated on February 9, 1987 where he remains at the time of the filing of this Petition For Writ of Certiorari. Upon this filing, Petitioner will seek a stay of execution

of the sentence from the Supreme Court of Florida. If unsuccessful there, a stay will be sought in this Court pending final resolution.

THE STAGES OF THE PROCEEDINGS IN ALL COURTS BELOW AT WHICH FEDERAL QUESTIONS SOUGHT TO BE REVIEWED HERE WERE RAISED, HOW THEY WERE RAISED, AND HOW DISPOSED OF ARE AS FOLLOWS:

1. In its decision requiring Petitioner to remain as Sanborn's attorney by using the formula of letting him testify falsely by narration and not mentioning it in summation, the Third District Court of Appeal of Florida, in Sanborn v. State, supra, specifically refers to the then pending Nix v. Whiteside case ready for decision by the United States Supreme Court at 474 So.2d 309 at 315, note 4. This indicates consideration of the federal questions involved in Nix by the Court in deciding Sanborn. In the same Sanborn decision, reference is made

to United States v. Curtis, 742 Fed. 2d 1070, (7th Cir. 1984) for the proposition that a client cannot compel his attorney to present false evidence, false testimony, nor perpetuate a fraud on the Court. Thus, the Sanborn Court considered the federal ramifications of that case and its findings.

2. Petitioner filed a Motion for Rehearing in Sanborn. Reference is made on Page 5 thereof (A-32) of the pending Nix case as Whiteside v. Scurr, 744 Fed. 2d 1323 (8th Cir. 1984). Petitioner alleged that Sanborn ignores that federal case which held that the Defendant would be denied effective assistance of counsel if withdrawal is denied and defense counsel is ordered not to elicit defendant's testimony nor

refer to it in closing arguments.

The Motion for Rehearing was denied.

The Sanborn Rehearing Motion also cites Strickland v. Washington, 104 S.Ct. 2052 (1984) in arguing that Petitioner could not fulfill his duties as described in the case if the Sanborn formula was executed. The Motion for Rehearing was denied.

3. Petitioner filed a Motion for New Trial from his conviction for contempt (A-45). Paragraph Six thereof alleged deprivation of due process as guaranteed under the Due Process Clause of the 14th Amendment to the United States Constitution by the trial court as a result of the conviction. The Motion for New Trial was argued and then

denied.

4. Petitioner appealed his contempt conviction to the Third District Court of Appeal of Florida. One of the points involved was whether the lawyer's Constitutional rights to procedural due process were violated by the conviction. On Page 32 of his Initial Brief, Petitioner urged:

> "the facts at Bar require reversal because Appellant was denied due process as required by both the Florida and United States Constitution."

In the Brief of the Appellee the State of Florida, the Strickland v. Washington, supra, is cited for the proposition that defendant's perjury could be nullified by mistrial or impeachment by the trial judge "and the reliability of the fact finding process would be preserved".

See Page 13 of that Brief. Petitioner's Reply Brief in the Appeal, on Page 4, used United States v. Havens, 446 U.S. 620 (1980) to emphasize that "truth is a fundamental goal of our legal system." Further on Page 5 we find the truism of Harris v. New York, 401 U.S. 222 (1971) that the United States Constitution does not protect perjured testimony.

Thus, federal law was considered by the Third District Court of Appeal in denying Petitioner's Appeal of the contempt conviction.

5. One hundred and eleven days before the Florida Appellate Court upheld Petitioner's conviction, judgment and sentence for direct criminal contempt in Rubin v. State, 490 So.2d 1001 (Fla. 3d

DCA 1986), the appellee State of Florida filed with that Court the Supplemental Authority the Opinion of the Supreme Court of the United States in Nix v. Whiteside, 106 S.Ct. 988 (1986). That case considers, comments on, and postulates correct attorney conduct in dealing with intended client perjury. Every issue presented here is thoroughly discussed there.

Guidelines distinguishing between ethical conduct and duty to clients are delineated. The Opinion in Rubin v. State, supra, although authored by one of the panel who decided and wrote a Concurring Opinion in Sanborn wherein he looked forward to this Court's decision in Nix to furnish such guidelines, makes no mention of Nix v. Whiteside. It does

cite United States v. Dickinson, 465 Fed. 2d 496 (5th Cir. 1972; Walker v. City of Birmingham, 87 S.Ct. 1824, 1976; and Malley v. Briggs, 106 S.Ct. 1092 (1986).

Thus, it is evident that certain federal issues were studied; some found there way into Rubin v. State and some did not.

6. Petitioner filed an Application for Writ of Habeas Corpus to the Supreme Court of Florida. On Page 5 (A-57) thereof, Paragraph 8 alleges that for a Florida trial Court to require a lawyer disobey the Code of Professional Responsibility, then to find him guilty of contempt for failure to do so, is contrary to and beyond the contemplation

of the Constitution of the United States of America.

The Petition for Habeas has been denied.

The State's response to the Petition for the Writ cites the United States Supreme Court case of Maness v. Meyers, 95 S.Ct. 584 (1975), on Pages 4 and 5 (A-63 to A-64). This case is seminal for a good faith precompliance review by resisting questionable orders. And the State also refers to Walker v. City of Birmingham, supra, on Page 5 of its Response to the Supreme Court of Florida.

Petitioner then filed a Second Amended Reply.

Each and every issue presented by this Petition for Writ of Certiorari to this

Court was thoroughly discussed and argued in that pleading, including Nix, Maness, Harris, and Strickland all of which were rejected by the Supreme Court of Florida when they denied Petitioner's Application for Writ of Habeas Corpus (A-66).

7. Petitioner's last pleading below is the Motion for Rehearing from the Supreme Court of Florida's denial of his Petition for Writ of Habeas Corpus (A-93).

Again, Maness, Nix, and Shillitani were discussed from the view that by ignoring them, Florida was depriving Petitioner of fundamental fairness and substantive due process guaranteed to all by the 14th Amendment to the U.S. Constitution. Rehearing was denied. (A-3).

REASONS RELIED ON FOR THE WRIT

> "In some future case challenging attorney conduct in the course of a state court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct." -- Mr. Chief Justice Burger, Nix v. Whiteside, supra, at 994, (1986).

This is that future case, and the Petitioner-attorney, because he performed exactly as prescribed in Nix, is believed to be the first American lawyer to be jailed for refusal to aid and abet intended client-perjury during a state criminal trial. It is thus obvious that "there are special and important reasons" for this court to review RUBIN V. STATE, 490 So.2d 1001 (Fla. App. 3 Dist. 1986), cert. denied by Supreme

Court of Florida Case, #69,048; and Petition for Writ of Habeas Corpus denied by Supreme Court of Florida, Case #69,025 (December, 1986); rehearing denied, January, 1987.

The Supreme Court of Florida, in denying Certiorari and Habeas Corpus, has approved the decision of the Third District Court of Appeal of Florida which decided an important question of federal law which has not been, but should be, settled by this Court, AND has decided a federal question in a way in conflict with applicable decisions of this Court:

Is it fundamentally fair and substantive due process for a State Court Judge to issue an Order to an attorney to allow

perjury and jury deception, the compliance of which would require him to violate his Oath of 35 years standing, the Florida Code of Professional Responsibility, prior Florida Supreme Court case law, and Florida criminal statutes; while the disobedience of which would bring him loss of liberty (30 days in jail), loss of property (public humiliation, loss of reputation), loss of income for the time in jail and afterwards, and disciplinary action by The Florida Bar that could lead to further property loss?

By punishing a lawyer for choosing ethics over a court order, Florida has placed restrictions on ethical standards and obligations that infringe on every lawyers' federal constitutional rights

to liberty and property. But, equally important is this:

For 35 years, Petitioner followed a certain course of conduct in his professional and personal life as an attorney. In court, he strove to always assist the legal system in making a jury trial a search for the truth. This was done by strict adherence to legal ethics. Suddenly, in 1985, he is faced with an almost impossible choice: either violate everything he has lived by and stood for as a free man and as a lawyer OR go to jail as a common criminal!

Is such a choice valid -- or is it unreasonable, irrational and unnecessary (in light of Nix, the Code of

Professional Responsibility and common sense)? The consequences of choosing ethics -- thus incarceration -- are widespread and dangerous. The public perception of a criminal justice system that jails a lawyer who reported intended perjury to a judge is disasterous. How can American law --American justice -- attempt to force a lawyer to be dishonest by jailing him? As it stands now, the entire Bench and Bar of Florida are under court order that they act legally and ethically when they knowingly allow a client to perpetrate fraud and perjury upon a jury while the lawyer can stand by and pretend it isn't happening. And if he refuses, the lawyers can be sent to jail!

The proper administration of justice is certainly under scrutiny here.

Petitioner knows of no other case where an American lawyer has been jailed for refusing to be a party to court-approved client perjury and deliberate jury deception. What could be of greater public importance?

While lawyers must never commit or assist in the commission of crimes, neither should they be jailed for trying to prevent one. They must use all honorable means to see that justice is done, rather than going to any lengths to see that the defendant is acquitted. An attorney must weigh his obligations to his client against his obligations to the profession and to society. It is often difficult to determine where the

rights of clients end and those of society begin. Can dilution of the rule of law be far behind when lawyers are required to protect instead of expose perjury?

How far can a lawyer go in defending a client accused of crime? Should his highest loyalty be to the client or to society? When an appellate court orders a lawyer to let a criminal defendant commit perjury and falsify testimony while defense counsel pretends to the jury that he doesn't know it, is the lawyer's silence participation? Is this fair to the jury -- and to the lawyer? Can such procedure fulfill the quest of all trials --WE WHO LABOR HER SEEK ONLY TRUTH?

Lawyers must be trusted to make moral and ethical decisions. It is both immoral and unethical to aid, participate in, acquiese to or suborn perjury - either actively or passively. The Code of Professional Responsibility does not require a lawyer to orchestrate a client's perjury and then argue to the jury that it should find true what the lawyer knows to be false; neither does the Code require defense counsel to be partners with a perjurious client in a dishonest and deceitful scheme. The Code commands just the opposite. Rubin requires exactly what the Code prohibits.

If Rubin is correct, where does it stop? Can a client now force his attorney to introduce forged documents, just as in

Rubin the client can force his attorney to allow introduction of perjured testimony? Surely it is better for justice and the goal of the legal system (to seek the truth) for the rule to remain that an attorney cannot knowingly use or allow to be used perjured testimony or otherwise participate in the creation or presentation of evidence the attorney knows to be false.

For a lawyer to participate in a dishonest trial is subversion of our judicial system. Past holdings of Florida courts and the 1983 ABA Model Rules condemn Florida's new formula for protecting client perjury. Lawyers must be dedicated to "finding the truth" instead of passively endorsing perjury by looking the other way. Silence here is par-

ticipation in a dishonest trial.

The Trial Court's Order to proceed to trial while using client perjury placed Petitioner in the untenable position of refusing a court order because he believed it violated the Code of Professional Responsibility. A lawyer should not be adjudged guilty of direct criminal contempt and placed in jail for thirty (30) days because he chose the Code and his personal integrity.

If a lawyer advises the Court that he does not wish to be a partner in what he considers dishonesty, deception, fraud and perjury --that he does not want to participate, even silently, in conduct he knows or thinks violates ethical standards and the criminal law, the

Court should honor the request to withdraw instead of placing the attorney in jail. In upholding those standards which guide us, this attorney has run afoul of a suggested procedure promulgated by Florida Courts. By choosing provisions of the Code to govern his conduct, he finds himself condemned as a criminal sentenced to serve time in jail.

The ultimate answers could determine not only the way our society views lawyers, but how they feel about our entire judicial system. The battle against crime is, after all, eventually fought in the courtroom.

If this contempt is upheld, it is now the law that a lawyer can legally,

ethically, morally and effectively use false testimony in a jury trial with Court approval if he looks the other way and pretends it is not happening. Appellant cannot believe that this Court would change our system of justice from seeking the truth to a lying contest.

Those are a few of the reasons why the Supreme Court of the United States should speak through this case. It is a great public importance that the standards and procedures mandated by Rubin be compared to those suggested by Nix. Is it better for justice to let jurors know that lawyers are no longer under any obligation to prevent perjury? And if the public comes to learn or even believe, through Rubin, that lawyers help other people to lie, why should

anybody believe them when they address juries?

CONCLUSION

A most dangerous precedent has been established by Florida in upholding Rubin. That opinion severely damages the reputation of the legal profession and our entire system of justice. It is for this Court to replace court-approved perjury and jury deceit with truth and justice. It is time to say: Nix on Rubin. For the foregoing reasons the Petition for Writ of Certiorari should therefore be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petition for Writ of Certiorari and an Appendix was mailed this 16th day of February, 1987 to: Julie S. Thornton, Assistant State Attorney General Department of Legal Affairs, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida; this 16th, day of February, 1987.

Respectfully submitted,

ELLIS S. RUBIN
Counsel of Record For
Petitioner and a
member of The Bar
of this Court
c/o Ellis Rubin Law
Offices, P.A.
and
I. MARK RUBIN
of counsel for
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the Supreme Court of
Florida
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305/576-5600

BY: _____
I. MARK RUBIN

86 1474 (2)

NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ELLIS S. RUBIN,

Petitioner,

v.

STATE OF FLORIDA,
and
FRED CRAWFORD,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

AMENDED APPENDIX*

ELLIS S. RUBIN
Counsel of Record For
Petitioner and a
member of The Bar
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c/o Ellis Rubin Law
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AMENDED APPENDIX TABLE OF CONTENTS

*AMENDED APPENDIX

*This Amended Appendix replaces the Appendix originally filed with the Petition in this cause. The cross reference below will correlate the original Appendix references (A) to Amended Appendix (AA).

CORRELATION TABLE

A	AA
A-1	AA-1
A-2	AA-3
A-3	AA-5
A-4	AA-6
A-9	AA-29
A-12	AA-22
A-15	AA-36

Those portions of the Appendix which were referred to as: A-22 through A-146 have been ommitted in the Amended Appendix.

SUPREME COURT OF FLORIDA

No. 69,048

ELLIS RUBIN, Esquire, Petitioner,

v.

STATE OF FLORIDA, Respondent,

[December 19, 1986]

District Court of Appeal,
3d District - No. 85-2370

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R.

App. P. 9.330(d),

McDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur
BOYD, J., dissents

The Motion to Strike filed in the above cause by attorney for Respondent is hereby denied.

McDONALD, C.J., ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

A True Copy
TEST:

Sidney J. White
Clerk Supreme Court

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Sidney B. Shapiro, Judge
Hon. Richard P. Brinker, Clerk

I. Mark Rubin, Esquire
Julie S. Thornton, Esquire

SUPREME COURT OF FLORIDA

No. 69,025

ELLIS RUBIN, Esquire, Petitioner,

v.

FRED CRAWFORD, Respondent,

[December 19, 1986]

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petitioner be and the same is hereby denied, and it is further

ORDERED that Petitioner's Motion to Consolidate and Amended Motion to Consolidate are hereby denied.

McDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

A True Copy

TC
cc: I. Mark Rubin, Esquire

Julie S. Thornton, Esquire

TEST:

Sid J. White
Clerk Supreme Court

SUPREME COURT OF FLORIDA

No. 69,025

ELLIS RUBIN, Esquire, Petitioner,

v.

FRED CRAWFORD, Respondent,

[December 19, 1986]

McDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

Upon consideration of the Motion for Rehearing filed in the above cause by petitioner,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy
TC
cc: Ellis S. Rubin, Esquire
Julie S. Thornton, Esquire

TEST:

Sid J. White
Clerk Supreme Court

Ellis S. RUBIN, Appellant,

v.

The STATE of Florida, Appellee.

No. 85-2370.

District Court of Appeal of Florida,
Third District.

June 17, 1986.

Ellis S. Rubin, in pro. per

Jim Smith, Atty. Gen., and Michael J. Neimand, Asst. Atty. Gen., for appellee.

Before HENDRY, HUBBART and DANIEL S. PEARSON, JJ.

DANIEL S. PERSON, Judge.

This is an appeal from an order holding the appellant, an attorney, in contempt for refusing to comply with the trial court's earlier order requiring the attorney to represent his client, a

criminal defendant accused of murder, in a trial scheduled to begin immediately. We affirm.

Nearly a year before the contempt order was entered, this same attorney representing the same criminal defendant (one Russell Sanborn) in the same murder case asked the same trial judge for permission to withdraw as Sanborn's defense counsel, the request being made just before jury selection was to begin. Although clothed in language ostensibly designed to preserve the client's confiential communications to his attorney (e.g., Rubin alleged that the defendant "confided new and contradictory details and heretofore unknown explanations" and "issued certain instructions to Rubin as to the strategy and tactics to be employed at the trial"), Rubin's message

to the court was that the defendant had insisted upon testifying falsely at trial. Accordingly, Rubin asked that he be excused from further representation of the client. The trial court denied the motion to withdraw and ordered Rubin to proceed to trial.[1] Rubin sought certiorari review of that order. This court denied his petition and in so doing assured Rubin that he would carry out his ethical obligations as an attorney (as well as render all the effective assistance to the defendant to which the defendant was entitled) by allowing "The defendant to take the stand and deliver

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1. Because the withdrawal of an attorney from a pending court action potentially affects the rights of the client, other parties to the action, and, in a criminal case, the public interest, the withdrawal must be approved by the court,

his statement in narrative form" and be refusing to "elicit the perjurious testimony by questioning... [or to] argue the false testimony during closing argument." Sanborn v. State, 474 So.3d 309, 313 (Fla. 3d DCA 1985). Rubin's motions for rehearing and rehearing en banc were denied, and he sought no further review in any other court, state or federal. Despite this, when upon the issuance of our mandate the case was restored to trial calendar, Rubin again sought to withdraw on the same ground as before. The trial court, scrupulously adhering to its initial ruling and our mandate, again denied Rubin's motion and

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(ftnote 1 cont'd) Fla.R.Jud.Admin. 2,060 (i), and an attorney may not withdraw without such approval, Fla. Bar Code Prof.Resp. D.R.2-110(A). In the present case, the trial court, noting that

again ordered him to proceed to trial. When Rubin refused, the contempt order which gives rise to this appeal was entered.

The law of the case, established by this court in Sanborn v. State, 474 So.2d 309, is that even if Sanborn were to testify in the manner Rubin claimed he would, Rubin could ethically repre-

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(ftnote 1 cont'd) Rubin was the fourth attorney to represent Sanborn, recognized in its order the interest at stake: "The Court must and has considered the timing of counsel's motion, the inconvenience to witnesses, the period of time elapsed beween the date of the alleged offense and the scheduled trial date, and, most importantly, the possibility and probability that any new counsel will be confronted with the same conflict."

sent Sanborn by refusing to specifically elicit or argue such testimony. Rubin contends, however, as he did before the trial court, that our decision in Sanborn v. State is, in his view, wrong, and, because he firmly holds to that view, he disobeyed the lower court's order to proceed.

Rubin is certainly free to disagree and maintain his personal view of what the law is or should be, or indeed his personal view of what some higher law

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(ftnote 1 cont'd) While Sanborn may have agreed to Rubin's withdrawal and a further postponement of the trial, neither the state, the public, nor the court was bound by Sanborn's acquiescence, See generally Fischer v. State, 248 So.2d 479, 484 n. 5 (Fla. 1971) (noting public interest factor in withdrawal from criminal action.)

provides.[2] It is, however, the decision of the mortal judges in Sanborn v. State, having not been stayed, much less set aside, by some higher court with jurisdiction over the matter, which Rubin must obey. Thus, even if, arguendo, it might have been later determined that Sanborn v. State was wrongly decided, Rubin's contumacious refusal to follow the undisturbed order to proceed would be nonetheless punishable as a direct contempt. As will be seen, this rule of law is essential to the maintenace of our system of laws as a whole.

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2. When asked if there was any reason the trial court should not adjudge him in contempt and punish him, Rubin's sole answer was:

"Yes, your Honor I am obeying the Code of Professional Responsibility. There is not only an irreconcilable con-

It is well settled in this state, and elsewhere, that where a court acting with proper jurisdiction and authority renders an order, an aggrieved party's failure to abide by the order may be punished by contempt even if the order is ultimately found to be erroneous. Health Clubs, Inc., v. State ex rel. Eagan, 377 So.2d 28 (Fla. 5th DCA 1979), appeal dismissed sub nom., Cataldo v. Eagen, 383 So.2d 1191 (Fla. 1980) (appellant's failure to obey injunction found to be erroneous as overbroad, punishable by contempt). See also State ex rel, Buckner v. Culbreath, 147 Fla. 560, 3 So.2d 380 (1941); State ex rel, Pearson v. Johnson, 334 So.2d 54 (Fla.

(ftnote 2 cont'd) flict between my client and myself, but between myself and the finding of the District Court of

4th DCA 1976); Friedman v. Friedman, 224 So.2d 424 (Fla. 3D DCA 1969); Annot., Right to Punish for Contempt for Failure to Obey Court Order or Decree Either Beyond Power or Jurisdiction of Court or Merely Erroneous, 12 A.L.R.2d 1059 (1950). The reason behind the rule requiring obedience to court orders regardless of their alleged invalidity is that the need for obedience to a court order far outweighs any detriment to individuals who may be temporarily victimized by the order, even if erroneous.

"If a party can make himself a judge of the validity of orders which have

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(ftnote 2 cont'd) Appeal. I believe that I must rely on not only the Code of Professional Responsibility but my own code of honor and integrity. I have to live with myself and I could not live with myself knowing that I'm deceiving

been issued for the protection of property rights, and by his own act of disobedience can set them aside, then are the courts impotent, and what the Constitution of the state ordains as the judicial power becomes a mere mockery. "This power has uniformly been held indispensable to enable the court to enforce its judgments and to execute its orders necessary to the due administration of law and the protection of the rights of citizens."

Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 101 Fla. 468 at 476, 134 So.529 at 433 (1931).

Rubin's personal view that the decision in Sanborn is erroneous (a far cry from a judicial declaration that the decision

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(ftnote 2 cont'd) a jury with or without "court approval".

a judicial declaration that the decision is erroneous) quite obviously cannot excuse his disobedience.

This power to punish disobedience of court orders through contempt is unique to the judicial branch of government. As one court explained:

> "The criminal contempt exception requiring compliance with court orders ... is not the product of self-protection or arrogance of Judges. Rather it is born of an experience-proved recognition that this rule is essential for the system of work.... Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives. Similarly, law enforcement is not prevented by failure to convict those who disregard the unconstitutional commands of a policeman. "On the other hand, the deliberate refusal to obey an order of the court without testing its validity through established processes requires

> further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, 'while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.'" United States v. Dickinson, 465 F.2d 496, 510 (5th Cir.1972), cert. denied, 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973).

Our system of justice simply cannot function if individuals -- however strong their views -- are free to ignore court orders. Therefore, that Rubin may believe that his position is virtuous and his disobedience moral -- or that his view may some day, in some other case,[3] prevail -- does nothing to

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3. As we have already noted, Rubin sought no further relief from our decision in Sanborn after we denied

excuse his refusal to comply with the court's order to proceed with the defense of Sanborn, In Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967), a majority of the United States Supreme Court, acknowledging the contemnors' strong and principled belief that an order enjoining them from assembling in the streets without a required permit flagrantly infringed upon their constitutional rights, nonetheless felt constrained to uphold the contempt convictions of the civil rights marchers who disobeyed the injunction.

Recognizing that adherence to law in a constitutional system is central to the

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(ftnote 3 cont'd) rehearing and rehearing en banc, Sanborn now represents the law in this district until

existence of law itself, the Court wrote:

> "The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioner's impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."
> Walker v. City of Birmingham, 388 U.S. at 320-21, 87 S.Ct. at 1832, 18 L.Ed.2d at 1219-20 (footnote omitted).

(cont'd 3 ftnote) changed by a later en banc decision, or by a decision of the Supreme Court of Florida.

Surely Rubin -- one trained in the law -- should know that if persons may with impunity disobey the law, it will not be long before there is no law left to obey.[4]

Affirmed.

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4. Rubin urges that if he followed our decision in Sanborn, he would have been exposed to prosecution for aiding and abetting Sanborn's perjury and Bar grievance proceedings. This argument is simply another way of saying that our decision in Sanborn was erroneous and is thus no defense to the contempt order. We do, however, note in passing that as a general rule a person's good faith reliance on a court order -- here, the decision in Sanborn -- is a complete defense to criminal prosecution, cf. Malley v. Briggs, 475 U.S. --, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (good faith reliance on warrant); Wright v. State of Florida, 492 F.2d 1086 (5th Cir. 1974) (good faith reliance on wiretap order); §934.10, Fla.Stat. (1985) (codification of rule that good faith reliance on court order is complete defense to illegal wiretap prosecution); §826.02(4), Fla.Stat. (1985) (codification of rule

(ftnote 4 cont'd) that good faith reliance on invalid divorce decree is complete defense to bigamy prosecution), and that, although only the Florida Supreme Court has jurisdiction over disciplinary matters, good faith reliance on a court order will likely not result in Bar discipline, cf. Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla.1978) (although trial court had no authority to immunize attorney from disciplinary proceedings, its decision to do so, justifiably based on Florida Supreme Court precedent, would be enforced).

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

Case No.: 84-010908
(Judge Shapiro)

State of Florida,

Plaintiff,

vs.

Russell J. Sanborn,

Defendant.

ORDER DENYING PETITION FOR
LEAVE TO WITHDRAW AS COUNSEL

Ellis S. Rubin, counsel for Defendant, RUSSELL J. SANBORN, filed a Petition for Leave to Withdraw as counsel for Defendant on the eve of trial. He contends that based upon information given to him by Defendant and defendant's mother on Thursday and Friday, April 25th and April 26th, 1985, he must

withdraw as defense counsel, a decision in which the Defendant concurs. He based his decision on several sections of the Florida Code of Professional Responsibility as cited in his Petition.

Defendant was initially appointed a Public Defender to represent him after he indicated he could not afford to retain private counsel. In July, 1984, he appeared before the Court, stated he had conflicts with his Public Defender, and requested a special assistance public defender be appointed to represent him. The Court (the undersigned Judge was on vacation) granted Defendant's request and appointed the attorney of defendant's choosing. A few weeks later the new defense counsel appeared before the Court and stated due to the fact he was a one man office he

could not adequately prepare a defense of this complicated case. He requested to be relieved of further responsibility. This Court granted counsel's request and appointed a third defense counsel, William Surowiec, to represent defendant.

The case moved forward toward trial with discovery being accomplished, but some month and a half ago the defendant decided he no longer was able to communicate with his counsel, appeared in Court and requested the Court to discharge counsel Surowiec and appoint a fourth attorney, Ellis Rubin, to represent defendant. This Court denied defendant's request.

Defendant's mother apparently was able to persuade Mr. Rubin to represent

defendant without charge. Counsel Rubin appeared before the undersigned, requested to be substituted as counsel and stated he would be ready to try this case as scheduled on April 25, 1985. This Court allowed the substitution after several assurances by Defendant himself that he would continue with Mr. Rubin as his counsel without question.

It is with the foregoing background that the instant Petition for Leave to Withdraw was placed before the Court.

This Court after thoroughly reviewing counsel's Petition, having heard argument from both counsel and comment from the Defendant, requested defendant's counsel to reveal that information which lead to the apparent conflict and problem between attorney and client. The Defendant refused to allow his

counsel to reveal the information to the Court either in open proceedings or in camera. This Court then ordered defense counsel to reveal the matter to the Court, in camera, which order defense counsel has refused.

The cases cited by defense counsel in support of his position, McNealy v. State, 183 So.2d 738 (Fla 1st DCA 1966), The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), and Automatic Data Processing etc. v. Scarberry, 412 So.2d 927 (Fla. 1st DCA 1982) do not support his contention. This Court has suggested a method whereby defense counsel can allow his client to testify, if that is the problem, which method was described during the hearing on this motion.

assistance of counsel" and "fair trial" are to be made by the Courts. A balancing of defendant's rights with the need for the Court to proceed in an orderly fashion must be met. A defendant cannot be permitted to dictate when and how a trial will proceed, and in this case, if it will proceed. This Court would expect every ethical lawyer appointed to represent defendant to be placed in the same position present defense counsel has been placed. Effectively, only an unethical lawyer would then be able to represent this defendant. This was never contemplated nor can this Court permit this result.

Based upon the foregoing, the Petition to Withdraw by defense counsel Ellis S. Rubin be and the same is hereby

denied. Pursuant to Florida Bar Disciplinary Rule DR 4-101 (D)(1), defense counsel is ordered to file with the Third District court of Appeal whatever documents required to avail himself of all appellate remedies available to him by 5:00 P.M. on April 30th, 1985.

DONE AND ORDERED in open Court this 29th day of April, 1985.

Sidney B. Shapiro
Circuit Judge

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

Case No.: 84-010908
(Judge Shapiro)

State of Florida,

Plaintiff,

vs.

Russell J. Sanborn,

Defendant.

ORDER ADJUDGING ATTORNEY
IN CONTEMPT OF COURT

THIS MATTER having come before the Court to be heard after the District Court of Appeal, Third District of Florida, entered its Order affirming the actions of this Court in denying a motion to withdraw as counsel of record filed by Ellis Rubin, Attorney for Defendant SANBORN, the Third District having denied the attorney's request to

rehear the issues en banc, this Court having received the "Status Report" filed by Attorney Rubin, and being otherwise fully advised in the premises, finds as follows:

1. Attorney Rubin is the fourth attorney representing Defendant Sanborn in the instant case.

2. Before this Court allowed Mr. Rubin to appear and assume responsibility for defending this case both the defendant and Mr. Rubin assured this Court the matter would be ready for trial on the scheduled trial date of April 29, 1985.

3. On that date Attorney Rubin filed his motion for leave to withdraw as counsel stating irreconcilable differences had developed between himself and

his client due to "certain things his client had advised Rubin the client was going to do at trial."

4. This Court, having reviewed the matter thoroughly, denied Attorney Rubin's motion for leave to withdraw and allowed an appeal to proceed without forcing the matter to trial.

5. The District Court of Appeal, Third District of Florida, issued its Order on July 16, 1985, wherein the Court discussed, at length, the problem presented to Mr. Rubin and this Court. The Appellate Court recognized the dilemma in which Rubin was placed but gave him a method to solve this dilemma which method would allow continued representation by Rubin of Sanborn and the case to proceed to trial.

6. This Court has given Attorney

Rubin a direct order to continue representing Defendant Sanborn and proceed to trial forthwith. Attorney Rubin has refused to comply with this Court's Order.[1]

7. This Court finds the actions of Attorney Rubin to be contemptuous and in direct criminal contempt of this Court. The Court has given Mr. Rubin the opportunity to state his reason why he should not be adjudged in contempt and punished for this contempt. The Court has further given Mr. Rubin the opportunity to present any evidence or excuse or mitigating circumstances.

Based on the foregoing findings of

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1. Attorney Rubin has always been respectful to this Court and while refusing to proceed has never done so in a discourteous manner.

this Court, it is concluded as follows:

1. The actions of Attorney Rubin constitute a contempt for which punishment must be imposed.

2. The District Court of Appeal has recognized as does this Court the primary responsibility of a trial Court is to facilitate the orderly administration of justice. This Court must balance this primary responsibility with the fact an irreconcilable conflict may exist between counsel and defendant. The Court must and has considered the timing of counsel's motion, the inconvenience to witnesses, the period of time elapsed between the date of the alleged offense and the scheduled trial date, and most importantly, the possibility and probability that any new counsel will be confronted with the same

conflict.

3. This Court further recognizes as has the Third District Court of Appeal and the Arizona Court in State v. Lee, 689 P.2d 153, 163-164 (1984), that counsel must within the confines of the law and his professional duties and responsibilities present his client's case as well as he can. The Appellate Court has outlined the procedure Attorney Rubin should follow. He has refused to do so. In so doing he has interfered with the orderly administration of justice. He has flaunted the authority of this Court in this "Court's face", although he has not done so in a discourteous manner.

Based on the foregoing findings of fact and conclusions of law, it is hereby Ordered and Adjudged as follows:

1. Attorney Ellis Rubin is found to be in direct criminal contempt of this Court and is adjudged in contempt of Court.

2. Attorney Rubin is hereby sentenced to serve thirty (30) days in the Dade County Jail for his contemptuous conduct.

3. The jail sentence is stayed pending any appeal Attorney Rubin wishes to file from this Court's Order and the disposition of this appeal.

4. Attorney Rubin is released on his own recognizance and shall remain free on his own recognizance through the exhaustion of appeals.

DONE AND ORDERED in Open Court this 13th day of September, 1985.

SIDNEY B. SHAPIRO
Circuit Court Judge

Copies furnished counsel of record

Russell J. SANBORN, Petitioner,

v.

The STATE of Florida, Respondent.

No. 85-949.

District Court of Appeal of Florida, Third District.

July 16, 1985.

Ellis S. Rubin, Miami, for petitioner.

Jim Smith, Atty. Gen., and Julie S. Thornton, Asst. Atty. Gen., for respondent.

Before NESBITT, DANIEL S., PEARSON and FERGUSON, JJ.

NESBITT, Judge.

Through a petition for writ of certiorari, the defendant's attorney, Ellis Rubin, requests this court to quash the trial court's order denying his motion

to withdraw as defense counsel.

The defendant is charged with first degree murder and a number of other crimes. In April 1984, the public defender was appointed to represent the defendant. In July 1984, the defendant requested that a special public defender be appointed due to conflicts with his then-attorney. The court granted the defendant's request and appointed the attorney of the defendant's choosing. A few weeks later, the newly appointed attorney appeared before the court and asked permission to withdraw, claiming that as a one-man office, he could not adequately prepare a defense in that case. The court granted this request and appointed a third defense attorney. The case proceeded toward trial, scheduled for April 29, 1985, until the

defendant decided he could no longer communicate with his attorney and, in February 1985, requested a fourth attorney, Rubin, be appointed. The trial court denied this request.

Subsequently, Rubin appeared before the court and requested to be substituted as defense counsel as he had been retained by the defendant's mother (apparently for no fee). Rubin represented to the court that he would be ready for trial on April 29, 1985. After several assurances from the defendant that he would continue with Rubin as his counsel, the court allowed the substitution.

On Thursday and Friday, April 25-26, 1985, Rubin confronted the defendant and his mother (an alleged key witness) "with facts and the results of physical evidence tests gathered through disco-

very" and the defendant and his mother "confided new and contradictory details and heretofore unknown explanations" to Rubin. In addition, the defendant "issued certain instructions to Rubin as to the strategy and tactics to be employed at the trial." Based on these events, Rubin petitioned the trial court on April 29, 1985, just prior to jury selection, to withdraw as defense counsel. The defendant did not oppose the withdrawal. During argument on the motion, the court asked Rubin to reveal the factual matters underlying his r tion. The defendant refused to consent to the disclosure and, therefore, Rubin correctly upheld his ethical obligation and refused to reveal the confidential communications. See Fla.Bar Code Prof.Resp., D.R. 4-101. Following

argument, the trial court denied Rubin's motion to withdraw and ordered him to proceed to trial.[1]

It is apparent from the record before us that the basis for Rubin's motion is that the defendant has directed Rubin to present evidence and/or testimony and argue facts which Rubin knows to be false. We recognize that Rubin, as an attorney, is placed in a serious dilemma between his role as an advocate of his client's best interests and as a guardian of the integrity of the judicial system in these circumstances. The ethical obligations of an attorney

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1. The trial court gave Rubin until the following day to seek review in this court. Rubin filed his petition for writ of certiorari in this court and we have stayed the proceedings below pending this decision.

require him to represent his client zealously, but this zealous representation must stay within the bounds of the law. Fla.Bar Code Prof.Resp., Canon 7. Looking first at Rubin's actions after learning of the "new ...details...and explanations" and being directed by defendant to proceed in a particular manner, we are of the opinion that Rubin has acted according to the moral and ethical obligations required of him as a member of the legal profession.

In representing a client, an attorney is held to strict requirements under the law and Florida's Disciplinary Rules which prohibit the use of fraudulent, false or perjured testimony or evidence. A lawyer may not knowingly use perjured testimony or false evidence or make a

false statement of law or fact. In addition, a lawyer may not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; nor may he counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. Fla.Bar Code Prof.Resp., D.R. 7-102(A). See also Fla.Bar Code Prof.Resp., D.R. 1-102; The Florida Bar v. Agar, 394 So.2d 405 (Fla.1980). A lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible and credible evidence. Further, a lawyer should not by subterfuge put matters before a jury which the jury should not properly consider. See Fla.Bar Code

Prof.Resp., E.C. 7-25.

> The law requires honest, loyal, genuine, and faithful representation of a defendant by his attorney, whether employed or court-appointed. A lawyer's professional duty requires him to be honest with the court and to conform his conduct to recognized legal ethics in protecting the interests of his client. Counsel, however, is never under a duty to perpetrate or aid in the perpetration of a crime or a dishonest act to free his client. Neither is he required to stultify himself by tendering evidence or making any statement which he knows to be false as a matter of fact in an attempt to obtain an acquittal at any cost. In conducting his task, counsel should be guided by the standard [of using] "all fair and honorable means' ... in discharging the duty ... "to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law." [citations omitted]

State v. Henderson, 205 Kan. 231, 468 P.2d 136, 140 (1970). Accord Carr v. State, 180 So.2d 381 (Fla. 2d DCA 1965). See also Thornton v. United States, 357 A.2d 429, 437-38 (D.C.App.), cert.

denied, 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 (1976).

The high ethical standards required of a criminal defense attorney are not inconsistent with the zealous representation which is guaranteed an accused and which the attorney is obligated to provide. Instead, both are designed to achieve the truth-finding goal of our legal system. People v. Schultheis, -- Colo. --, 638 P.2d 8, 12 (1981) (En Banc). See also Henderson, 468 P.2d at 141. Our legal system provides for the adjudication of disputes governed by rules of substantive, evidentiary and procedural law. The objective of our system is to ascertain an accused's guilt or innocence in accordance with established rules of evidence and procedure designed to develop the facts

truthfully and fairly. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law. See Fla.Bar Code Prof.Resp., E.C. 7-19; Schultheis, 638 P.2d at 12. Henderson, 468 P.2d at 141.

The foregoing analysis does not mandate that a trial court allow an attorney to withdraw from a case whenever his client insists on presenting false testimony or evidence through either the client's own testimony or another witness' testimony. Regardless of the client's wishes, defense counsel must refuse to aid the defendant in giving

perjured testimony and also refuse to present the testimony of a witness that he knows is fabricated. When a serious disagreement arises between defense counsel and the accused, and counsel is unable to dissuade his client from insisting that fabricated testimony be represented, counsel should request permission to withdraw from the case. If the motion to withdraw is denied, however, he must continue to serve as defense counsel. So long as the attorney performs competently as an advocate under the circumstances, the defendant is represented effectively and the integrity of the adversary system of justice is not compromised. Schultheis, 638 P.2d at 13. See State v. Lee, 142 Ariz. 210, 689 P.2d 153, 163 (1984) (En Banc).

Rubin does not face such a serious dilemma with regard to the defendant's instructions regarding trial strategy and tactics. The power to decide questions of trial strategy and tactics ultimately rests with counsel. Lee, 689 P.2d at 158. Once such tactical, strategic decision concerns counsel's determination of what witnesses to call and what evidence to present. Id.; Schultheis, 638 P.2d at 12. Thus, a defendant cannot compel his counsel to call witnesses to present a fabricated alibi or any other false testimony, nor compel the introduction of false evidence. Schultheis, 638 P.2d at 12. See People v. Williams, 2 Cal.3d 894, 88 Cal.Rptr. 208, 471 P.2d 1008 (1970) (In Bank), cert. denied, 401 U.S. 919, 91 S.Ct. 903, 27 L.Ed.2d 821 (1971); State

v. Robinson, 290 N.C. 56, 224 S.E2d 174 (1976). See also United States v. Curtis, 742 F.2d 1070, 1074-75 (7th Cir.1984). Since a defendant's right to effective assistance of counsel does not include the right to require his attorney to perpetrate a fraud on the court, it is generally considered that a refusal to call a particular witness because of obedience to ethical standards which prohibit the presentation of fabricated testimony does not constitute ineffective assistance of counsel. See Schultheis, 638 P.2d at 12 and authorities cited. In fact, the Supreme Court of Arizona has held that succumbing to a client's demand to elicit obvious perjurious testimony from witnesses amounts to ineffective assistance of counsel since the attorney, thereby, fails to

fulfill his duty to make the tactical, strategic decisions at trial. Lee, 689 P.2d at 159.

Tactical decisions require the skill, training and experience of the advocate. A criminal defendant, generally inexperienced in the workings of the adversarial process, may be unaware of the redeeming or devastating effect a proffered witness can have on his case. Accordingly, in the present case, Rubin should disregard any instructions from the defendant concerning trial strategy and tactics if Rubin should determine that following the instructions would be either contrary to the defendant's best interest or contrary to Rubin's ethical obligations as an attorney.

The worst dilemma that could be facing Rubin in the present case is that

his client, the defendant, insists upon testifying falsely at trial.[2] If at trial, however, there remains a chance of perjured testimony being presented by the defendant, formulas have been proposed which preserve the sanctity of the tribunal and the ethical standards that Rubin, as an officer of the court, has vowed to uphold. The procedure most often sanctioned in this situation is to allow the defendant to take the stand and deliver his statement in narrative form; the defendant's attorney does not elicit the perjurious testimony by questioning nor argue the false testimony during closing argument.[3] See

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2. We emphasize that a lawyer's task is not to determine guilt or innocence but only to present evidence so that others

3. The seventh circuit recognized this procedure in Curtis, 742 F.2d at 1076-77

Coleman v. State, 621 P.2d 869, 881 (Alaska 1980), cert. denied, 454 U.S. 1090, 102 S.Ct. 653, 70 L.Ed.2d 628 (1981); People v. Salquerro, 107 Misc.2d 155, 433 N.Y.S.2d 711, 714 (N.Y.Sup.Ct. 1980); State v. Covington, 279 S.C. 274, 305 S.E.2d 578, 580 (1983). The attorney, of course, is not precluded from arguing sound, non-perjurious testimony or attacking the state's case. Under this procedure, a defendant is afforded his right to speak to the jury under oath and the constitutional right to assistance of counsel is preserved, but the defense attorney is protected from participating in the fraud. Under such a formula, the responsibility for com-

(ftnote 2 cont'd) either court or jury can do so. A lawyer, therefore, should

(ftnote 3 cont'd) n.4. The court, however, took the approach that although

mitting or not committing fraud on the tribunal lies with the defendant, and not with his attorney, and the jury will decide whether the defendant's testimony is credible. Salquerro, 433 N.Y.S.2d at 713-14.

Rubin argues, however, that such procedure would deny the defendant effective assistance of counsel. We disagree. Although a defense attorney has an ethical duty to zealously represent his client, that duty must be met in conjunction with, rather than in opposition to, other professional obligations, The ethical strictures under which an attorney acts forbid him to

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(ftnote 2 cont'd) should not decide what is true and what is not unless there is is compelling support for his

(ftnote 3 cont'd) a defendant has a

tender evidence or make statements which he knows to be false. Thornton, 357 A.2d at 437-38. It is axiomatic that the right of a client to effective assistance of counsel in any case does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation of false evidence. Salquerro, 433 N.Y.S.2d at 714 (quoting ABA Informal Opinion 1314). See also Coleman; Thornton; Covington; Maddox v. State, 613 S.W.2d 275, 284 (Tex.Crim.App.1980). Certainly, the constitutional right to effective assistance of counsel does not encompass

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(ftnote 2 cont'd) conclusion. State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978).

(ftnote 3 cont'd) constitutional right to take the stand and testify truthfully

the right to an unethical attorney when a criminal defendant thinks it is in his best interest to present false evidence.

The trial court recognized that allowing Rubin to withdraw and appointing a fifth defense attorney would not alleviate the problem. If withdrawal were allowed every time a lawyer was faced with an ethical disagreement with the accused, the ultimate result could be a perpetual cycle of eleventh-hour motions to withdraw and an unlimited number of continuances for the defendant. In addition, new counsel might fail to recognize the problem of fabricated testimony and false evidence

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(ftnote 2 cont'd) Mere suspicion or inconsistent statements by the defendant alone are insufficient to

(ftnote 3 cont'd) in his own behalf, counsel may refuse to allow a defendant

would be represented to the court; or, perhaps the defendant might eventually find an attorney who lacks ethical standards and who would knowingly present and argue false evidence. Neither result is acceptable since fraud is committed upon the court in either case. Schultheis, 638 P.2d at 14-15; Salquerro, 433 N.Y.S.2d at 713. See also Coleman, 621 P.2d at 882; Henderson, 468 P.2d at 142; Covington, 305 S.E.2d at 579. As the New York court has stated:

> If the motions to withdraw and recuse are granted, substitution of court and counsel, unaware of the possibility of perjury, may overtly facilitate, or appear to condone, a fraud

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(ftnote 2 cont'd) establish that the defendant's testimony would have been false. Whiteside v. Scurr, 744 F.2d

(ft note 3 cont'd) to testify when it is clear the defendant will testify per-

> upon the court. Such substitution procedures would effectively cloak the problem; however, this ostrich-like approach would do little to resolve it.

Salquerro, 433 N.Y.S.2.d at 713.

For this reason, trial courts are given broad discretion to determine whether a motion to withdraw should be granted in situations like the present one. The primary responsibility of the court is to facilitate the orderly administration of justice. See Schultheis, 638 P.2d at 15 and cases cited. In making the decision of whether to grant counsel permission to withdraw, the trial court must balance the need for orderly admi-

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(ftnote 2 cont'd) 1323, 1328 (8th Cir.1984), cert. granted. -- U.S.--, 015 S.Ct. 2016, 85 L.Ed.2d 298 (1985).

(ftnote 3 cont'd) juriously. The court did not discuss the possibility of the defendant testifying truthfully in part.

nistration of justice with the fact that an irreconcilable conflict exists between counsel and the accused. In doing so, the court must consider the timing of the motion,, the inconvenience to witnesses, the period of time elapsed between the date of the alleged offense and trial, and the possibility that any new counsel will be confronted with the same conflict. Schultheis, 638 P.2d at 15. Accord Lee, 689 P.2d at 163; Covington, 305 S.E.2d at 579. As long as the trial court has a reasonable basis for believing that the attorney-client relation has not deteriorated to a point where counsel can no longer give

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(ftnote 3 cont'd) By quoting the procedure suggested by the ABA Standards for Criminal Justice in a footnote, however, the court impliedly indicated that a defendant may have a constitutional

effective aid in the fair presentation of a defense, the court is justified in denying a motion to withdraw. See Henderson, 468 P.2d 141; Schultheis, 638 P.2d at 15. The decision of a trial court to deny a motion to withdraw will not be disturbed absent a clear abuse of discretion. Under the circumstances of the present case, we find that the trial court did not abuse its discretion by requiring Rubin to remain as the defendant's advocate.

We approve the Arizona supreme court's position on this troublesome problem that many criminal defense attorneys are confronted with:

> If "irreconcilable conflicts" arise between a particular defendant and a

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(ftnote 3 cont'd) right to take the stand in such a situation.

> string of attorneys, we trust the trial court will, when the orderly administration of justice requires, refuse permission to withdraw. In such a case, counsel must, with in the confines of the law and his or her professional duties and responsibilities, present the client's case as well as he or she can. A criminal defendant is entitled to full and fair representation within the bounds of the law. If he or she is dissatisfied with the representation to which he or she is entitled in our system, self-representation is available. Counsel must not compromise the integrity of his or her client, the court, or the legal profession by exposing a client's proclivities or by engaging in an ethical conduct at a client's request.

Lee, 689 P.2d at 163-64. We note that although this is a case of first impression in Florida, most courts that have considered this problem in other jurisdictions have resolved it in the same manner as we do here. See, e.g., Lee; Schultheis; Thornton; State v.

Whiteside, 272 N.W.2d 468 (Iowa 1978);[4] Henderson; Salquerro; Robinson; Covington. Cf. Anderson v. State, 439 So.2d 961, 962 (Fla. 4th DCA 1983) ("The trial judge did not abuse his discretion when he denied counsel's eleventh hour motion to withdraw based on a mere speculation as to the nature of the victim's testimony.")

Accordingly, the petition for writ of certiorari is denied.

DANIEL S. PEARSON, Judge concurring.

I concur in the decision to deny the petition for certiorari and thereby uphold the trial court's order denying Mr. Rubin's motion to withdraw as counsel for Sanborn. I believe, however, that the majority's dicta, "deciding:

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4. We note that the Iowa supreme court's decision on this issue in

that Rubin will be both ethical and effective, if, at trial, he disowns defense testimony he perceives to be perjurious, constitutes an uncalled for advisory opinion.

According to Rubin, the trial court's ruling forces him to choose between his obligation to further the administration of justice and his obligation to provide his client with effective assistance. The majority attempts to assure Rubin that he has no dilemma, and tells Rubin that if he conducts himself in the forthcoming trial in the manner prescribed by the majority, he will be both ethical and effective. Yet, there is now, and there has been for some time, a very serious question whether an

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(ftnote 4 cont'd) Whiteside has been effectively overruled by the Eight

attorney who, attempting to live up to the code of professional responsibility, refused to elicit or argue his client's known perjurious defense, nonetheless provides effective assistance of counsel. See Whiteside v. Scurr, 744 F.2d 1323 (8th Cir.1984); Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich.L.Rev. 1469 (1966); Noonan, The Purposes of Advocacy and The Limits of Confidentiality, 64 Mich.L.Rev. 1483 (1966); Bress, Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility, 64 Mich.L.Rev. 1493 (1966). Hopefully, the United States

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(ftnote 4 cont'd) Circuit Court of Appeals on a petition for writ of habeas corpus. Whiteside v. Scurr, 744 F.2d

Supreme Court, which, as the majority notes, has granted certiorari in the Whiteside case, see majority opinion at 314 n.4, will answer this question. For now, I think we should wait and see what Rubin does at trial and whether Sanborn is convicted. In the event Sanborn is convicted, he through other counsel, will likely present to a court, in the setting of an actual controversy, his contention that although Rubin may have behaved ethically, he was ineffective. Obviously, that contention is not before us now.

(ftnote 4 cont'd) 1323 (8th Cir.1984). The Eight Circuit, however, is sharply divided on the issue. The panel opinion withstood a motion for rehearing en banc five-four vote which produced four separate opinions. Whiteside v. Scurr, 750 F.2d 713 (8th Cir.1984) (denying

(ftnote 4 cont'd) motion for rehearing en banc). The Supreme Court has recently granted certiorari in the case, Nix v. Whiteside, -- U.S. --, 105 S.Ct. 2016, 85 L.Ed.2d 298 (1985), (certiorari granted), and, therefore, attorneys may soon be given some definitive guidance as to the proper action to be taken when their ethical obligations seemingly come in conflict with their client's constitutional rights.

(3)

CASE NO. 86-1474

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1986

ELLIS S. RUBIN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

* *

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
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8497

QUESTION PRESENTED

WHETHER ADJUDICATING THE PETITIONER, AN ATTORNEY, IN DIRECT CRIMINAL CONTEMPT FOR REFUSING TO OBEY AN ORDER OF THE COURT THAT HE CONTINUE TO REPRESENT A CLIENT WHO APPARENTLY INSISTED ON TESTIFYING FALSELY AT TRIAL AFTER PETITIONER WAS ALLOWED TO APPEAL THE DECISION OF THE TRIAL COURT AND WAS INFORMED BY THE STATE APPELLATE COURT OF THE APPROACH TO TAKE IN FURTHER REPRESENTING THE CLIENT VIOLATED ANY CONSTITUTIONAL OR DUE PROCESS RIGHTS ENJOYED BY PETITIONER?

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PREFACE

The Petitioner, Ellis S. Rubin, was the defendant in the trial court, the Appellant in the District Court of Appeal of Florida, Third District, and the Petitioner in the Supreme Court of Florida. The Respondent, the State of Florida, was the prosecution in the trial court, the Appellee in the District Court of the Appeal of Florida, Third District and the Respondent in the Supreme Court of Florida. The symbol "R. App." shall be used to designate reference to the Respondent's Appendix. The symbol "P. App" shall be used to designate reference to Petitioner's Appendix.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported as Rubin v. State, 490 So.2d 1002 (Fla. 3d DCA 1986), pet. for review denied, ___ So.2d ___ (Fla. 1986). (P. App. 6).

JURISDICTION

The jurisdiction of this Court is sought by Petitioner under 28 U.S.C. §1257(3), based upon his contentions that the State of Florida has deprived him of rights secured by the Constitution of the United States. Respondent would urge that this Court lacks jurisdiction to consider Petitioner's claims under 28 U.S.C. §1257(3), as Petitioner's claims do not raise any federal constitutional issues and involve only questions of state law. Respondent will elaborate on the lack of jurisdiction in the argument section of this brief.

CONSTITUTION, STATUTORY AND STATE REGULATIONS INVOLVED

Petitioner has set forth at page 3 of the petition the constitutional provisions, state regulations, and state statutes which are allegedly involved in the instant petition.

STATEMENT OF THE CASE AND FACTS

On April 29, 1985, the Petitioner, who was representing one Russell Sanborn on the charge of first degree murder, filed a motion to withdraw as counsel. (R. App. 1-14). The essence of the motion to withdraw, which was filed on the eve of trial, was that Petitioner's client insisted upon testifying falsely or presenting false evidence at trial and, therefore, Petitioner sought to be released from representing Sanborn. After a hearing, the trial court denied the motion. In its order denying the petition for leave to withdraw, the trial court noted that Petitioner was the fourth attorney appointed to represent Sanborn. The court determined that "every ethical lawyer appointed to

represent defendant [would] be placed in the same position present defense counsel has been placed." (P. App. 22-28). Accordingly, the trial court sought to balance the "defendant's rights with the need to proceed in an orderly fashion." (P. App. 27). The trial court suggested a method whereby the defendant would present his testimony in narrative form without assistance of counsel. (P. App. 22-28).

Petitioner then filed a petition for common law certiorari in the Third District Court of Appeal seeking to review the order of the lower court denying his motion to withdraw. (R. App. 15-39). The district court denied the petition for writ of certiorari on July 16, 1985. Sanborn v. State, 474

So.2d 309 (Fla. 3d DCA 1985). (P. App. 36-64). While recognizing the ethical obligations of attorneys which prohibit the knowing use of fraudulent, false or perjured testimony, the district court clearly set forth ways by which Petitioner could go forward as counsel for Sanborn while preserving the sanctity of the tribunal and the ethical standards Petitioner has vowed to uphold. Sanborn v. State, supra. (P. App. 36-64).

Petitioner filed motions for rehearing and rehearing en banc of the district court order, which were denied. He sought no further review of the order.

Upon return to the trial court, Petitioner again sought to withdraw as counsel on the same ground. The trial court again denied the motion to withdraw and ordered Petitioner to proceed. Petitioner refused and an order was entered finding Petitioner in direct criminal contempt of court for refusing to comply with the court's order. (P. App. 29-35).

Petitioner filed an appeal from the contempt order in the Third District Court of Appeal. The appellate court affirmed the order of the trial court. Rubin v. State, 490 So.2d 1001, (Fla. 3d DCA 1986). (P. App. 6-21). Petitioner began serving the 30-day sentence imposed for the finding of contempt on July 11, 1986. On that same date,

Petitioner filed a petition for writ of habeas corpus with the Florida Supreme Court alleging that he was illegally confined, imprisoned, and restrained.

The Florida Supreme Court issued an order immediately releasing Petitioner on his own recognizance and ordering Respondent to show cause why relief should not be granted.

In addition, the Petitioner filed a petition to invoke the discretionary jurisdiction of the Supreme Court to review Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986). On December 19, 1986, the Florida Supreme Court entered an order denying the Petition for Writ of Habeas Corpus and an order denying review of Rubin v. State, supra. (R.

App. 40-43). Petitioner filed a motion for rehearing of the denial of the Petition for Writ of Habeas Corpus on December 31, 1986.

The motion for rehearing was denied on January 16, 1987. (R. App. 44-45). Petitioner completed serving the sentence imposed. Petitioner then filed a Petition for Writ of Certiorari to the Supreme Court of Florida. This brief is filed in opposition to the granting of the writ.

REASONS IN OPPOSITION TO THE GRANTING OF WRIT

ADJUDICATING THE PETITIONER, AN ATTORNEY, IN DIRECT CRIMINAL CONTEMPT FOR REFUSING TO OBEY AN ORDER OF THE COURT THAT HE CONTINUE TO REPRESENT A CLIENT WHO APPARENTLY INSISTED ON TESTIFYING FALSELY AT TRIAL AFTER PETITIONER WAS ALLOWED TO

APPEAL THE DECISION OF THE TRIAL COURT AND WAS INFORMED BY THE STATE APPELLATE COURT OF THE APPROACH TO TAKE IN FURTHER REPRESENTING THE CLIENT DID NOT VIOLATE ANY CONSTITUTIONAL OR DUE PROCESS RIGHTS ENJOYED BY PETITIONER.

Petitioner has failed to raise a federal constitutional issue in either this Court or the State courts, and jurisdiction is therefore lacking under 28 U.S.C. §1257(3).

Petitioner indicates in his Petition that the main issues to be resolved in this case are: "What should the lawyer do when his criminal client intends to testify falsely in State Court? And, where ethics and a Court order collide, must a lawyer be jailed for choosing ethics?" (Petitioner's Petition for a Writ of Habeas Corpus, p. i). The issues presented are not federal constitutional issues. As such,

jurisdiction does not exist under 28 U.S.C. §1257(3).

28 U.S.C.§1257(3) permits this Court to review "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had . . ." This Court has held that "it is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases." The New York Times Co., v. Jascalevich, 439 U.S. 1317, 1318, 99 S.Ct. 6, 58 L.Ed.2d 25, 28 (1978). See also, Martin v. Walton, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5, rev. den., 368 U.S. 945, 82 S.Ct. 376, 7 L.Ed.2d 341 (1961); McNabb v. United States, 318 U.S. 332, 340, 87 L.Ed.2d 819, 63 S.Ct. 608, rev. den., 319 U.S.

784, 63 S.Ct. 1322, 87 L.Ed.2d 1727 (1943); Moore v. Illinois, 408 U.S. 786, 799, 92 S.Ct. 2562, 33 L.Ed.2d 706, 716 (1972). In addition, the record must clearly reflect "that the federal claim was adequately presented in the State system." Webb v. Webb, 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392, 397 (1981). The issues presented by Petitioner meet none of the above jurisdictional requisites.

In Nix v. Whiteside, ___ U.S. ___, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), this Court recognized that it is "the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." Indeed, Justice Brennan made clear in his con-

curring opinion that the question of legal ethics is not a constitutional question. Justice Brennan wrote:

> This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics
>
> Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of professional conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." Ante, at ___. I read this as saying in another way that the Court cannot tell the States or the lawyers in the states how to behave in their courts, unless and until federal rights are violated.

Nix v. Whiteside, supra at _____.
(emphasis in original).

Accordingly, it is clear beyond peradventure that it is left to the State's to regulate the conduct of the attorneys that practice within each State. As such, rules of ethics of a particular state and the regulation of attorney conduct within that state are the sole province of the state courts and do not present questions of constitutional dimension. The wisdom or propriety of the method sanctioned by the Florida Bar and the Florida courts for dealing with a client who intends to commit perjury, which is the essence of

the instant Petition, simply does not present a federal question.[1]

Moreover, Petitioner never sought review in the Supreme Court of Florida of Sanborn v. State, supra, the decision of the District Court of Appeal which sets forth the procedure for dealing with a client who intends to commit perjury. Having failed to seek review of that decision in the State Court of last

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[1] This brief only concerns the issue of whether this Court should accept jurisdiction of the case for certiorari review. Accordingly, Respondent will refrain from arguing the soundness of the resolution approved by

resort, he is precluded from seeking review of that decision in this court. Stratton v. Stratton, 239 U.S. 55 (1915), 36 S.Ct. 26, 60 L.Ed. 142, (1915); Mathews v. Huwe, 269 U.S. 262, 46 S.Ct. 108, 70 L.Ed. 266 (1925); Banks v. California, 395 U.S. 708, 89 S.Ct. 1901, 23 L.Ed.2d 653 (1969).

The sole remaining question, therefore, is whether Petitioner has properly raised a substantial federal question concerning his conviction for criminal contempt based upon his refusal to comply with a direct order of the court enforcing a procedure approved by

the Florida courts for dealing with a client who intends to commit perjury.[2] As will be demonstrated below, the answer to this question is in the negative.

In each and every pleading filed in the State courts, petitioner argued that the order of contempt was erroneously entered because the method prescribed by the courts and regulations for dealing with a client who intends to commit

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[2] The District Court of Appeal also held that the solution proposed would not violate the ethical standards that Petitioner is bound to uphold as a

perjury was improper. Indeed, Petitioner merely rehashed the arguments previously made subsequent to the denial of his motion to withdraw. As noted earlier, these contentions do not raise a substantial federal question which would warrant review under §1257. The only time Petitioner even alleged a violation of a right claimed under the constitution was in his appeal to the district court from the contempt conviction. In said brief, Petitioner alleged, inter alia, that the trial court denied him of his constitutional right to due process of law where he was not furnished adequate notice and hearing prior to his contempt conviction. (R. App. 46-48). The claim, which was raised in only cursory fashion, was never decided by the

district court of appeal. (P. App. 6-21). More importantly, however, Petitioner never presented the claim to the Florida Supreme Court for review. Indeed, Petitioner does not now contend that his due process rights were violated based upon a lack of notice and hearing. Accordingly, the only presentation of a federal issue in the state courts was never presented to the highest court of the state nor presented to this court as a basis for review. This Court has held that "when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of presentation in the state courts, unless the aggrieved party in this court can affirmatively show to the contrary." Street v. New York, 394 U.S.

576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572, 579 (1969). This Petitioner has not done., Indeed, he cannot do so.

In his brief, Petitioner attempts to set forth various federal questions which were allegedly raised in the state courts. (Petitioner's brief, p. 12-20). A review of this section of Petitioner's brief reinforces the Respondent's position that Petitioner has never raised a federal question in the state courts. Petitioner merely cites to various United States Supreme Court decisions which were cited in the briefs filed in the state courts and the decisions of the state courts. Mere reference to a United States Supreme Court decision does not establish, however, that the state court based its

decision upon a federal question. For example, Petitioner states that the Third District Court of Appeal of Florida "specifically refers" to Nix v. Whiteside, supra, in its decision in Sanborn v. State, supra. Petitioner asserts that such reference "indicates consideration of the federal questions involved in Nix by the court in deciding Sanborn." Petitioner's brief, p. 12. This assertion is clearly erroneous. The federal question in Nix v. Whiteside was whether the defendant had been denied effective assistance of counsel guaranteed by the Sixth Amendment. There is no such question in the instant case. Indeed, Petitioner has done nothing more than cite to cases referred to by or in the state courts in resolving the State question of what is

the proper solution for dealing with a client who intends to commit perjury.

Mere reference to cases which were decided by this court clearly does not establish that Petitioner "presented" or that the state court "decided" the constitutional issues resolved therein.

CONCLUSION

Based upon the foregoing analylsis, Respondent would urge that this court refuse to invoke certiorari jurisdiction in that the petition does not raise any substantial federal constitutional issues.

Respectfully submitted

ROBERT A. BUTTERWORTH
Attorney General

JULIE S. THORNTON
Assistant Attorney General

RICHARD L. POLIN
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES** was furnished by mail to **ELLIS S. RUBIN, Esquire** and **I. MARK RUBIN, Esquire**, Ellis Rubin Law Offices, P.A., 265 N.E. 26st Terrace, Miami, Florida, 33137 on this ___th day of May, 1987.

RICHARD L. POLIN
Assistant Attorney General

/dmc

APPENDIX TO

BRIEF OF RESPONDENT ON JURISDICTION

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL
CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

CASE NO. 84-010908

STATE OF FLORIDA,
Plaintiff

vs.

RUSSELL J. SANBORN,

Defendant.
_____/

PETITION FOR LEAVE TO WITHDRAW

ELLIS RUBIN LAW OFFICES, P.A., by and through ELLIS S. RUBIN, ESQUIRE, petitions this Court for leave to withdraw as counsel of record for the Defendant, RUSSELL J. SANBORN, in this and all other causes within the jurisdiction of this Court as follows:

FACTUAL BACKGROUND

1. Petitioner has been admitted to practice law in Florida since 1951; he

has participated in thousands of jury and non-jury civil, criminal and administrative trials and appeals in the past 34 years while rejecting thousands of others. He is thoroughly familiar with and is morally, ethically and legally bound by the Florida Code of Professional Responsibility (including Canons, Ethical Considerations and Disciplinary Rules) as promulgated by the Supreme Court of Florida.

2. On February 11 and 13 and again on March 9, 1985, the mother of this Defendant wrote poignant letters to Petitioner -- followed up by phone calls and personal interviews -- pleading for Petitioner to enter this case as defense counsel. A woman with no income other than from selling vegetables and from

disability checks, Holly Sanborn even offered to "sign a contract to pay $100.00 a month for the rest of my life. . . ." to "Please help this young man, he is not guilty--."

3. After preliminary investigation, interviews with the Defendant, and a refusal by the Court to be appointed, Petitioner agreed on March 12, 1985 to represent the Defendant without any fee. The Defendant had previously been declared indigent for costs. Petitioner's Motion for Substitution of Counsel was granted by Court Order on March 19, 1985, at which time trial-by-jury was set for April 29, 1985. The State seeks the death penalty for a First Degree Murder Count.

4. Four lawyers and two secretaries have devoted almost full time for the past 42 days in preparing for trial for this Defendant. A total of about 261 hours -- including the taking of over 25 depositions, retention of experts, research, interviews, etc. -- have been devoted to discovery.

5. Beginning on Monday, April 22, 1985, Petitioner has been able to put together, interpret and place before the Defendant the facts in this case. On Thursday and Friday, April 25 and April 26, respectively, the Defendant and his mother have confided new details and heretofore unknown explanations to Petitioner based on witness depositions and physical evidence recently produced.

6. Because of the caveat of EC 2-32, Code of Professional Responsibility, calling for counsel "to minimize the possible adverse effect on the rights of his client and the possibility of prejudices to his client as a result of his withdrawal", and the additional prohibitions of the Code's DR 4-101 (B)(1) whereby Petitioner "shall not knowingly reveal a confidence of secret of his client," Petitioner cannot further detail Paragraph 5 above.

7. The Defendant herein has properly instructed Petitioner as to what plea should be entered in this cause and has attempted to exercise the exclusive authority to make decisions as to the conduct of his defense -- including the contents of Opening Statement,

Summation, and the examination and cross-examination of witnesses; however, such decisions must be made "within the framework of the law" to be binding on his lawyer (emphasis supplied). See EC 7-7 of the Code.

8. Because of the Defendant's instructions to Petitioner following and during the discussions between them relative to Paragraph 5 and 7 above, Petitioner has notified the Defendant that he must withdraw as defense counsel in this cause. Petitioner agrees with such proposed withdrawal. The reasons cited to Defendant for such action involve Paragraph 2 of the Preamble to the Florida Code of Professional Responsibility; Ethical Considerations 1-5, 7-1, 7-5, 7-6, 7-7, 7-19, 7-25, 7-

26, 8-5 and 9-6; and Disciplinary Rules 1-102 (1)(4) and (5), 2-110(B)(2) and (C)(1)(c) and (C)(2), 7-101(B)(2) and 102 (A)(4)(5)(6) (7) and (8).

THE LAW

9. The Preliminary Statement forewarding the Florida Code of Professional Responsibility defines Disciplinary Rules as "a minimum level of conduct below which no lawyer can fall without being subject to disciplinary actions." Likewise, Ethical Considerations represent "the objectives toward which every member of the profession should strive." From EC 7-1 we learn that the duty of a lawyer, both to his client and to the legal system, is to represent his client "zealously within the bounds of the law,

which includes Disciplinary Rules and enforceable professional regulations." Further, EC 9-6 implores every lawyer "to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility;. . . ." Indeed, the First DCA of Florida reminds us of the "ethical considerations implicated when an attorney" acts in the way this Defendant desires Petitioner at Bar to do. Automatic Data Processing v. Seaberry, 412 So.2d 927 (1982).

10. Disciplinary Rules are mandatory in character. They are uniformly applied to all lawyers within the framework of fair trial. According to DR 1-102(A)(1), it is professional misconduct

for a lawyer to violate a Disciplinary Rule. According to sub-part (A)(5), it is also professional misconduct for this Petitioner to "engage in conduct that is prejudicial to the administration of justice."

11. When a lawyer representing a client before a tribunal "knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule," DR 2-110(B)(2) makes it mandatory to withdraw from such employment. Withdrawal is permissive if such a request is because the client insists that the lawyer pursue a course of conduct that is prohibited by the Disciplinary Rules, or if the lawyer's continued employment is likely to result in a violation of a Disciplinary Rule. See DR 2-110(C)(1)(c) and (C)(2).

12. What this Defendant has requested, instructed and demanded Petitioner to do during the jury trial of this cause would, if done, cause Petitioner to knowingly engage in conduct contrary to Disciplinary Rules. This itself would violate DR 7-102(A)(8).

CONCLUSION

During every one of the 34 years of performance as a Florida trial lawyer, Petitioner -- and indeed every member of the Bar -- has been confronted with the difficult task of maintaining the Honor of the profession, integrity of the judicial system, the truth and self-respect while affording clients the

zealous advocacy of their cause within the bounds of the law, including keeping inviolate confidences and secrets. Without all of the foregoing, justice would be available only to those able to seek out, employ, and use lawyers willing to dishonor the law, dishonor the people, and dishonor themselves.

It is permissible to argue positions supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. To knowingly assist a client to engage in illegal conduct or counsel him on how to violate the law and avoid punishment therefor is prohibited.

Petitioner has learned that one of the greatest assets any client can have is an advocate whose personal integrity and credibility is considered by judges and juries as triers of fact. Only by a strict adherence to the Code of Professional Responsibility can a lawyer attain such stature. Petitioner rejects and is revulsed by the "words of wisdom" foisted on trial lawyers by the self-styled expert and oft-quoted lawyer and Harvard Law Professor Alan M. Dershowitz, who, on page 24 of the Spring 1984 issue of Trial Diplomacy Journal teaches defense counsel: "Let's face it, in reality it's the prosecutor's job primarily to bring out the truth and it's the defense attorney's job primarily to suppress the truth. Those are completely different

functions. If I am right, and I have never heard any defense attorney disagree with this, the vast majority of criminal defendants that we defend are guilty. Obviously, then, it's our job to make sure that the truth, the whole truth and nothing but the truth does not come out."

Petitioner cannot fulfill his obligations or adhere to his oath by accepting and then carrying out the instructions of this Defendant at this trial.

WHEREFORE, based on the foregoing, Petitioner both requests permission and notifies this Court that it is mandatory for ELLIS RUBIN LAW OFFICES, P.A. to be granted leave forthwith to withdraw from

all representation of RUSSELL J. SANBORN in this and other causes.

Respectfully submitted,

ELLIS RUBIN LAW OFFICES, P.A.
265 Northeast 26th Terrace
Miami, Florida 33137
(305) 576-5600

BY:_____
ELLIS S. RUBIN
For the Firm

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to the Defendant, RUSSELL J. SANBORN and to the Office of State Attorney for the 11th Judicial Circuit of Florida in Open Court, this 29th day of April, 1985.

ELLIS RUBIN LAW OFFICES, P.A.
BY_____
ELLIS S. RUBIN

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CIRCUIT COURT CASE NO. 84-010908

RUSSELL J. SANBORN,

Defendant/Petitioner,

v.

STATE OF FLORIDA,

Plaintiff/Respondent.

On Appeal from the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida

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PETITION FOR WRIT OF COMMON LAW CERTIORARI

ELLIS RUBIN LAW OFFICES, P.A.
265 Northeast 26th Terrace
Miami, FL 33137
305/ 576-5600

BY: ELLIS S. RUBIN

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TABLE OF AUTHORITIES

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

Circuit Case No. 84-010908

RUSSELL J. SANBORN,

Defendant/Petitioner,

v.

STATE OF FLORIDA,

Plaintiff/Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI

ELLIS RUBIN LAW OFFICES, P.A., attorney of record for the Defendant below, RUSSELL J. SANBORN, petitions for a Writ of Certiorari to the Circuit Court of the 11th Judicial Circuit, In and For Dade County, Florida, the Honorable Sidney B. Shapiro, Circuit Judge, to review an Order Denying Petition For Leave To Withdraw As Counsel for the Defendant below. Petitioner

seeks further relief by way of Emergency Hearing as suggested by the Trial Court in the attached Appendix.

JURISDICTION

Jurisdiction arises out of Florida Rule of Appellate Procedure 9.030 (b)(2)(A) and by Florida Rule of Appellate Procedure 9.130 (a)(1)(2). In addition, Disciplinary Rule 4-101(D)(1) of the Florida Code of Professional Responsibility governing the conduct of attorneys in Florida, is applicable herein because the Trial Court has ordered Petitioner to reveal the confidences and/or secrets of a client and the client has refused his consent thereto and a lawyer can be made to reveal such confidences or secrets "provided that a lawyer required

by a tribunal to make such a disclosure may first avail himself of all appellate remedies available to him."

STATEMENT OF THE FACTS

Petitioner is counsel of record for the Defendant Sanborn in Dade Circuit Court, Honorable Sidney B. Shapiro presiding, wherein jury trial has been set for the Defendant on several criminal charges including First Degree Murder and the State seeks the death penalty. Petitioner's entire staff of four lawyers and two secretaries devoted 42 days to preparing for this jury trial, expending about 261 hours--including the taking of over 25 depositions.

Jury trial was set to commence on Monday, April 29, 1985. Beginning on Monday, April 22,1985, Petitioner confronted the Defendant and his mother (who retained Petitioner for the Defendant at no fee and who will be an essential witness for both sides at the trial) with facts and the results of physical evidence tests gathered through discovery; on Thursday and Friday, April 25 and April 26 respectively, the Defendant and his mother confided new and contradictory details and heretofore unknown explanations to the Petitioner and Defendant issued certain instructions to the Petitioner as to the strategy and tactics to be employed at the trial.

Because of the caveat of EC 2-32, Code of Professional Responsibility, calling for counsel "to minimize the possible adverse effect on the rights of his client and the possibility of prejudices to his client as a result of his withdrawal", and the additional prohibitions of the Code's DR 4-101(B)(1) whereby Petitioner "shall not knowingly reveal a confidence of secret of his client", Petitioner cannot further detail.

Because of the Defendant's instructions to Petitioner and his revelation of "new details" and "heretofore unknown explanations", Petitioner verbally notified Defendant and then filed a written Petition For Leave To Withdraw As Counsel for the Defendant. The

Defendant agreed and did not oppose such proposed withdrawal. The written Petition was presented to the Trial Court on the morning of April 29, 1985 and after extensive argument, the Trial Court denied said Petition For Leave To Withdraw As Counsel. The Appendix attached hereto contains a certified copy of the Petition, the Order denying same, and a transcript of the proceedings.

The reason cited to the Defendant and to the Trial Court for the requested withdrawal involved Paragraph 2 of the Preamble the Florida Code of Professional Responsibility; Ethical Considerations 1-5, 7-1, 7-5, 7-6, 7-7, 7-19, 7-25, 7-26, 8-5 and 9-6 of the Code; and Disciplinary Rule 1-102(1)(4) and (5),

2-110(B)(2) and (C)(1)(c) and (C)(2), 7-101(B)(2) and 7-102(A)(4)(5)(6)(7) and (8) of the Code.

During oral argument on the Petition For Leave To Withdraw, the Trial Court on pg. 31 of the transcript ordered Petitioner to divulge the conversations between the Petitioner and the Defendant which caused the Petitioner to ask to withdraw. In response, Petitioner read to the Trial Court Disciplinary Rule 4-101 of the Code of Professional Responsibility which prohibits a lawyer from knowingly revealing a confidence or secret of his client unless the client consents thereto or if required by a tribunal to make such a disclosure. On pg. 32 of the transcript, Defendant refused to consent

to any revelations; as a result, at pg. 35 of the transcript, the Trial Court directed Petitioner to file this proceeding in this Court and to "request an immediate emergency hearing by the Third District Court." Judge Shapiro then set the matter down for report back to him by May 2, 1985 at 9:00 a.m. On pg. 36 of the transcript, the Trial Court also agreed to include some statement in his Order Denying Petition For Leave To Withdraw to the effect that this is a matter of great public importance requiring a decision for

NATURE OF RELIEF SOUGHT

This Court may order a Writ of Common Law Certiorari to the Circuit Court reversing that Court's Order

Denying Petition For Leave To Withdraw as counsel and/or may affirm or overrule the Trial Court's Order requiring Petitioner to reveal the confidences and secrets of the Defendant. Petitioner would show that the Petition For Leave To Withdraw As Counsel should have granted by the Trial Court in that the Code of Professional Responsibility makes such withdrawal mandatory and/or permissive upon certain showings to the Presiding Judge. Because the Trial Court failed to grant said Petition, there was a departure from the essential requirement of law which would allow this Court to issue an order directing the Respondent, State of Florida, to show cause why this relief should not be granted, or such Show Cause Order could be the subject of oral argument as is

now being requested by this Petitioner on an emergency basis.

ARGUMENT

The provisions allowing or mandating withdrawal from employment by attorneys representing clients before tribunals is rendered in the Code of Professional Responsibility, Disciplinary Rule 2-110. Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character; they state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. They are uniformly applied to all lawyers.

According to DR 2-110(B)(2), it is mandatory for a lawyer to withdraw from

employment if "He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."

And, DR 2-110(C)(1)(b)(d) and (2) and (5) allows a lawyer to request withdrawal because the client "Personally seeks to pursue an illegal course of conduct or insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules or by other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively." Also, if the lawyer's "continued employment is likely to result in a violation of a Disciplinary Rule" or if the client "knowingly and freely assents to termination of his employment."

Accordingly, there are two (2) other Disciplinary Rules that are applicable to the Rule requiring mandatory or permissive withdrawal from employment, to wit: DR 1-102(A)(1)(4)(5) and DR 7-101(B)(2) and 7-102(A)(4)(5)(6)(7) and (8). Spelled out, these Rules provide that a lawyer shall not "Violate a Disciplinary Rule, engage in conduct involving dishonesty, fraud deception or misrepresentation, nor engage in conduct that is prejudicial to the administration of justice." Additionally, in his representation of a client, a lawyer may "Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." And finally, a lawyer shall not "knowingly use perjured testimony or

false evidence, knowingly make a false statement of law or fact, participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false, counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent, and knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule."

Petitioner herein had all of the foregoing in mind when certain confidences and secrets were revealed to him by the Defendant on the eve of trial. As an officer of the Court and still bound by the Disciplinary Rules, Petitioner could not tell the Trial Court nor can he tell this Court the nature or details of why the actions of the

Defendant fulfilled the restrictions put on every Florida lawyer by the Disciplinary Rules.

Petitioner was faced with the age-old dilemma of going forward with a trial that he knew to be prejudicial to the administration of justice in many, many ways and in violation of many, many Disciplinary Rules or requesting permission to withdraw while preserving the Defendant's right to a fair trial with effective assistance of counsel. There was no choice but to request "out".

When the Trial Court demanded to know what the details were that caused the Petitioner to ask for leave to withdraw, we now argue that the Circuit

Judge went too far. It should have been sufficient that an officer of the court, sworn to uphold the Canons of Ethics and reciting in a written motion followed by oral argument as much as he could in order to not violate the Disciplinary Rule against revealing the confidences or secrets of clients, for the Court to have acted at that point to grant withdrawal. Petitioner alleged to the Trial Judge those violations sufficient to allow both mandatory withdrawal according to DR 2-110(B)(2) and to allow permissive withdrawal under DR 2-110(C)(1)(b)(c)(d) and (2) and (5). When a lawyer, sworn to uphold the Code of Professional Responsibility, attempts to do so in a written motion supported by oral argument, a Trial Court should allow that lawyer to obey the

Disciplinary Rules without jeopardizing the lawyer and/or the client any further.

By refusing leave to withdraw after the lawyer has assured the judge that, according to the Rules, it is both mandatory and permissable for the lawyer to withdraw, why should the Trial Court refuse and then require the lawyer to further breach the Code by ordering the lawyer to reveal a confidence or secret of his client without the consent of the client? Fortunately, the Trial Judge recognized the predicament of Petitioner and has allowed him this Petition For Common Law Certiorari in this Court rather than to hold the lawyer in contempt of court.

Thus, the two (2) issues for this Court to resolve based on the proceedings in the Trial Court are:

> (1) When a lawyer is confronted with blatant present and future violations of the Disciplinary Rules by his client and, thus, present and future violations of the Code of Professional Responsibility by the lawyer himself if he carries out the wishes of the client on the eve of a criminal jury trial, and should the lawyer petitior the Trial Judge for mandatory and permissive withdrawal, should the Trial Judge grant the Petition without further inquiry?
>
> (2) If the foregoing is answered in the negative, may the Trial Court require the lawyer, without the consent of the client, to detail those words and acts of the client that led the lawyer to petition for withdrawal in order for the Trial Judge to decide whether to grant or deny the Petition For Withdrawal?

To answer the foregoing, this Court must refer to "the law". In this case "the law" for every licensed lawyer in the State of Florida is the do's and don't's contained in the Disciplinary Rules in the Code of Professional Responsibility. While a Trial Judge may be concerned with his calendar and a fair trial for both sides and a prosecutor with alleged tactics of delay by the Defendant, the Petitioner here is concerned with his solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his

clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety (EC 9-6).

A lawyer, in defending a client, cannot do a number of things, as recited above, not the least of which is to violate a Disciplinary Rule nor engage in conduct involving dishonesty, fraud, deceit, or misrepresentation nor to engage in conduct that is prejudicial to the administration of justice, including the knowing use of perjured testimony or false evidence, knowingly making a false statement of law or fact, participating in the creation or preservation of evidence when he knows or it is obvious that the evidence is false nor can he counsel or assist his client in conduct

that the lawyer knows to be illegal or fraudulent nor may he knowingly engage in illegal conduct or conduct contrary to a Disciplinary Rule. Why were these prohibitions placed into the Code or "the law" for lawyers with the provision that if any of those deeds occur, they are then to be automatically considered as grounds for the lawyer to withdraw from further representation of that client? The answer is quite fundamental: if those acts were not prohibited, lawyers could indulge in dishonesty, fraud, deceit, misrepresentation and conduct that is prejudicial to the administration of justice. There would be no system of justice; there would be no need for a Code of Professional Responsibility.

CONCLUSION

At some point in his career as a trial lawyer, every member of the profession must make the decision to go along with a defense that he knows is dishonest or to petition for leave to withdraw. Petitioner is at this point and has decided to Petition For Leave To Withdraw; said Petition has been denied. As a result, Petitioner has availed himself of the appellate remedy available to him. Petitioner requests this Court to reverse and overrule the Order of the Trial Court denying his Petition For Leave To Withdraw and as part of its decision, it is further requested that this Court rule that Petitioner shall not reveal confidences or secrets of the Defendant without the consent of the

Defendant. An Emergency Hearing with oral argument is requested respectfully.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to: DAVID WAKSMAN, Assistant State Attorney, 1351 N. W. 12th Street, Miami, FL 33125, this 30th day of April, 1985.

ELLIS RUBIN LAW OFFICES, P.A.
265 Northeast 26th Terrace
Miami, Florida 33137
305/576-5600

BY: _____
ELLIS S. RUBIN

SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 19, 1986

ELLIS RUBIN, Esquire,

Petitioner

CASE NO. 69,048
Dist. Ct.Apl.
3d DCA 85-2370

v.

STATE OF FLORIDA,

Respondent.

/

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constition (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R. App.P. 9.330(d).

McDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur
BOYD, J., dissents

The Motion to Strike filed in the above cause by attorney for Respondent is hereby denied.

McDONALD, C.J., ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

A True Copy

TEST

Sid J. White, Clerk
Supreme Court of Florida

cc:Hon. Louis J. Spallone,Clerk
Hon. Sidney J. Shapiro, Judge
Hon. Richard P. Brinker, Clerk

I. Mark Rubin, Esquire
Julie S. Thornton, Esquire

SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 19, 1986

ELLIS S. RUBIN, Esquire,

Petitioner

CASE NO. 69,025

v.

FRED CRAWFORD,

Respondent.

_____/

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied., and it is further

ORDERED that Petitioner's Motion to Consolidate and Amended Motion to Consolidate are hereby denied.

McDONALD, C.J., ADKINS, BOYD, OVERTON, EHRLICH, SHAW AND BARKETT, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

TC
cc: I. Mark Rubin, Esquire
Julie S. Thornton, Esquire

SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 16, 1987

ELLIS RUBIN, Esquire,

Petitioner

CASE NO. 69,025

v.

FRED CRAWFORD,

Respondent.

_____/

Upon consideration of the Motion for Rehearing filed in the above cause by petitioner,

IT IS ORDERED that said Motion be and the smae is hereby denied.

McDONALD, C.J., OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur ADKINS, J., dissents

A True Copy
TEST

Sid J. White
Clerk, Supreme Court

TC
cc: Ellis S. Rubin, Esquire
Julie S. Thornton, Esq.

IV.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY DEPRIVING HIM OF ADEQUATE NOTICE AND OPPORTUNITY TO RETAIN COUNSEL AND PREPARE A RESPONSE AND BY DEPRIVING HIM OF AN IMPARTIAL TRIBUNAL

Based on the Federal Eleventh Circuit Court of Appeals case of Sandstrom v. Butterworth, 738 F.2d 1200 (1984), Appellant here would show that he was denied due process when the Trial Judge did not furnish adequate notice or give sufficient time to Appellant to respond to the contempt charge and to retain counsel of his choice; nor did the Trial Court defer adjudication and sentencing of the contempt to another judge (an impartial Tribunal). The Sandstrom court cites Taylor v. Hayes, 94 S.Ct.

2697 (1974) and Codispoti v. Pennsylvania, 94 S.Ct. 2687 (1974), to show that basic notice and hearing are required in contempt matters. Due process must be observed, whether alleged contempt occurs during or after the trial involved.

At page 1211 of Sandstrom we find:

> Adjudication before a neutral and unbiased tribunal stands as one of the most fundamental of due process rights.
>
> * * * * *
>
> The requirement of neutrality has been jealously guarded by this Court.
>
> * * * * *
>
> The court has also long recognized that, as with other due process values, use of the summary contempt power can seriously compromise the right to an unbiased tribunal.

The facts at Bar require reversal because Appellant was denied due process as required by both the Florida and U.S. Constitutions.